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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY MICHAEL ALVAREZ, Defendant and Appellant.	H043234 (Santa Cruz County Super. Ct. Nos. F22948, F23933, F25120, F25028)

Defendant Anthony Michael Alvarez appeals from an order denying his request to strike a prior prison term enhancement imposed under Penal Code section 667.5, subdivision (b).[1] Defendant contends that the trial court was required to strike the enhancement because the offense underlying the conviction had been redesignated a misdemeanor pursuant to section 1170.18[2] after the passage of Proposition 47.[3] The order is affirmed.

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1 All further statutory references are to the Penal Code unless otherwise stated.

2 Our references to section 1170.18 are to the version which took effect in November 2014.

3 This issue is before the California Supreme Court. (*People v. Valenzuela* (2016) 244 Cal.App.4th 692 (*Valenzuela*), review granted Mar. 30, 2016, S232900.)

I. Background

A. Case No. F22948

In July 2012, the Santa Cruz County District Attorney's Office filed an information in case No. F22948, which charged defendant with: transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a) - count 1); possession of a controlled substance for sale (Health & Saf. Code, § 11378 - count 2); possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a) – count 3); possession of an injection device (Health & Saf. Code, § 11364.1, subd. (a) - count 4); and driving with a suspended or revoked license (Veh. Code, § 14601.1, subd. (a) - count 5). The information also alleged that defendant had four prior prison term enhancements pursuant to section 667.5, subdivision (b). The prior prison term enhancements were based on defendant's violations of sections 666 and 496, subdivision (a), Health and Safety Code section 11377, subdivision (a), and Vehicle Code section 10851, subdivision (a).

B. Case No. F23933

In February 2013, the Santa Cruz County District Attorney's Office filed an information in case No. F23933 which charged defendant with: possession for marijuana for sale (Health & Saf. Code, § 11359 - count 1); possession of hydrocodone (Health & Saf. Code, § 11350, subd. (a) - count 2); and possession of oxycodone (Health & Saf. Code, § 11350, subd. (a) - count 3). The information also alleged that defendant had four prior prison term enhancements (§ 667.5, subd. (b)) and an on-bail enhancement (§ 12022.1).

C. Plea and Sentencing in Case Nos. F22948 and F23933

In April 2013, defendant pleaded guilty to all counts and admitted all of the enhancement allegations in case Nos. F22948 and F23933. The pleas were entered

pursuant to a negotiated agreement for both cases in which defendant would not be sentenced to more than three years and eight months and would have the possibility of probation.

On June 26, 2013, in case No. F22948, the trial court struck one of the prior prison term enhancements (§ 667.5, subd. (b)), imposed and suspended imposition of a six-year sentence, and placed defendant on probation for three years. In case No. F23933, the trial court suspended imposition of sentence and placed defendant on probation for three years.

Two days later, the trial court revoked defendant's probation in case Nos. F22948 and F23933.

D. Case No. F25028

On July 1, 2013, the Santa Cruz District Attorney's Office filed a criminal complaint in case No. F25028 and charged defendant with possession of cocaine and heroin (Health & Saf. Code, § 11350, subd. (a) - count 1) and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a) - count 2). The complaint also alleged that defendant had four prior prison term enhancements (§ 667.5, subd. (b)).

Two weeks later, defendant entered a plea of no contest to count 1 and admitted two prior prison term enhancements. The trial court dismissed count 2 and struck the other two prior prison term enhancements. On the same date, defendant also admitted violating the terms of probation in case Nos. F22948 and F23933.

E. Case No. F25120

On July 17, 2013, the Santa Cruz District Attorney's Office filed a criminal complaint in case No. F25120 and charged defendant with possession of a controlled

substance in a jail facility (§ 4573.6). The complaint also alleged four prior prison term enhancements (§ 667.5, subd. (b)).

A week later, defendant pleaded no contest to possession of a controlled substances in a jail facility (§ 4573.6) and admitted one prior prison term enhancement. The trial court struck the remaining prior prison term enhancements.

F. Sentencing

On August 23, 2013, the trial court imposed the previously suspended sentence of six years in case No. F22948[4] and deemed case No. F22948 the principal case. In case No. F25028, the trial court sentenced defendant to eight months and imposed and stayed sentence on defendant's two prior prison term enhancements. In case No. F25120, the trial court sentenced defendant to two years in state prison. The trial court ordered that defendant's sentences in case Nos. F25028 and F25120 run consecutive to the six-year sentence in case No. F22948 and ordered that defendant serve the sentences after completing his six-year sentence in case No. F22948.

In September 2013, the trial court sentenced defendant in case No. F23933 to eight months in state prison. Thus, defendant's total aggregate sentence was nine years and four months in case Nos. F22948, F23933, F25028, and F25120.

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[4] The six-year sentence included: a two-year prison term on count 2 (the principal term) (possession of a controlled substance for sale - Health & Saf. Code, § 11378); a consecutive one-year prison term on count 1 (transportation of a controlled substance - Health & Saf. Code, § 11379, subd. (a)); a concurrent two-year prison term on count 3 (possession of a controlled substance - Health & Saf. Code, § 11350, subd. (a)); a concurrent 30-day jail term on count 4 (possession of an injection device - Health & Saf. Code, § 11364, subd. (a)); a concurrent 30-day jail term on count 5 (driving with a suspended or revoked license - Veh. Code, § 14601.1, subd. (a)); and a one-year term for each of the three prior prison term enhancements (§ 667.5, subd. (b)), which was based on defendant's prior violations of section 496 and 666 and Vehicle Code section 10851, subdivision (a).

G. Resentencing

On September 29, 2015, the trial court redesignated defendant's felony section 666 (petty theft with a prior) conviction to a misdemeanor in case No. F14501 pursuant to section 1170.18, subdivision (f).

On November 20, 2015, defendant filed a petition for resentencing pursuant to section 1170.18, subdivision (b).

On January 5, 2016, the trial court redesignated all four of defendant's felony convictions for violation of Health and Safety Code section 11350[5] to misdemeanors and resentenced him accordingly. However, the trial court denied defendant's request to strike his prior prison term enhancement (petty theft with a prior) in case No. F22948.

II. Discussion

Defendant contends that the prior prison term enhancement alleged in case No. F22948 must be stricken because the underlying conviction is no longer a felony under Proposition 47.

A. Legal Principles

1. Proposition 47

In November 2014, voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (the Act). (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014.) Proposition 47 amended certain statutes to reduce those offenses to misdemeanors and also added new misdemeanor offenses. (§ 1170.18, subd. (a); *People v. Chen* (2016) 245 Cal.App.4th 322, 326.)

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[5] These convictions included: count 3 in case No. F22948; counts 2 and 3 in case No. F23933; and count 1 in case No. F25028.

Proposition 47 also included provisions for resentencing. A defendant who is currently serving his or her sentence for a felony conviction, and who would have been guilty of a misdemeanor if the Act had been in effect at the time of the offense, may file an application to have the felony conviction resentenced as a misdemeanor. (§ 1170.18, subd. (a).) If the petitioner satisfies the criteria in section 1170.18, subdivision (a),[6] the trial court must recall the petitioner's felony sentence and resentence the petitioner to a misdemeanor unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).) Alternatively, when a defendant has completed a felony sentence for an offense which is eligible for reduction to a misdemeanor under Proposition 47, he or she must file an application to have the felony reduced to a misdemeanor pursuant to section 1170.18, subdivision (f). (*People v. Shabazz* (2015) 237 Cal.App.4th 303, 310.) If the application satisfies the criteria in section 1170.18, subdivision (f), the trial court must reduce the felony to a misdemeanor. (*People v. Shabazz*, at pp. 310-311.)

2. Prior Prison Term Enhancement

A prior prison term enhancement under section 667.5, subdivision (b) may be imposed "where the new offense is any felony . . . ." Historically, "[i]mposition of a sentence enhancement under . . . section 667.5 require[d] proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction;

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[6] Section 1170.18 provides in relevant part: "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a).) Section 1170.18, subdivision (b) provides that a court that receives such a petition shall resentence the petitioner "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety."

(3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. [Citation.]" (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) Section 667.5, subdivision (b) has been amended to account for prison realignment and the fact that some felony sentences are now served in county jail under subdivision (h) of section 1170. However, the basic requirements of a section 667.5, subdivision (b) finding remain the same.

"Sentence enhancements for prior prison terms are based on the defendant's status as a recidivist, and not on the underlying criminal conduct, or the act or omission, giving rise to the current conviction." (*People v. Gokey* (1998) 62 Cal.App.4th 932, 936.) The purpose of the prior prison term enhancement is "'to punish individuals' who have shown that they are '"hardened criminal[s] who [are] undeterred by the fear of prison."' [Citation.]" (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115.)

3. Principles of Statutory Construction

"[O]ur interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. [Citations.] We therefore first look to 'the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context.' [Citations.]" (*People v. Park* (2013) 56 Cal.4th 782, 796 (*Park*).) "'The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.] When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]' [Citation.]" (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) "'"When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." [Citation.]' [Citation.]" (*People v. Hendrix* (1997) 16 Cal.4th 508, 512.)

B. Analysis

Defendant relies on the language of section 1170.18, subdivision (k), which states: "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except [for firearm possession]." He thus contends that the plain language of section 1170.18, subdivision (k) directs the trial court to treat a redesignated misdemeanor conviction as a misdemeanor for all purposes and thus the former felony conviction cannot serve as the basis for a sentencing enhancement previously imposed under section 667.5, subdivision (b).

In considering defendant's contentions, this court must determine whether the "misdemeanor for all purposes" language of section 1170.18, subdivision (k) applies retroactively. Retroactive application of the statute would allow resentencing of a defendant whose sentence was enhanced pursuant to section 667.5, subdivision (b), when he or she had served a prior prison term and the trial court redesignated the underlying felony conviction as a misdemeanor pursuant to section 1170.18, subdivision (a).

Section 3 states that no part of the Penal Code is "retroactive, unless expressly so declared." The California Supreme Court has interpreted section 3 "to mean '[a] new statute is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise. [Citation.]'" (*People v. Alford* (2007) 42 Cal.4th 749, 753.) "[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209.)

Section 1170.18, subdivision (k) does not include any language indicating that its application is retroactive. Defendant has not directed us to any extrinsic sources, such as the ballot materials for Proposition 47, that indicate that the voters intended retroactive

application. (See *People v. Whaley* (2008) 160 Cal.App.4th 779, 793-794.) In addition, our review of the ballot materials did not reveal any language suggesting that the voters intended that section 1170.18, subdivision (k) be applied retroactively. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of Prop. 47, § 3, subds. (3)–(5), p. 70; *id.*, analysis of Prop. 47 by Legislative Analyst, pp. 35–36.)

Since there is neither an express retroactivity provision nor an expression of voter intent that the "misdemeanor for all purposes" language in section 1170.18, subdivision (k) be applied retroactively, we conclude that the application of section 1170.18, subdivision (k) is prospective only. (See *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1100 ["the phrase 'shall be considered a misdemeanor for all purposes' in section 1170.18, subdivision (k) does not apply retroactively"].)

Nor are we persuaded by defendant's argument that analogous case law establishes that redesignated misdemeanors cannot serve as the basis for prior prison enhancements under section 667.5, subdivision (b). He relies on *Park, supra*, 56 Cal.4th 782, *People v. Flores* (1979) 92 Cal.App.3d 461 (*Flores*), *In re Acker* (1984) 158 Cal.App.3d 888 (*Acker*), and *People v. Culbert* (2013) 218 Cal.App.4th 184 (*Culbert*).

In *Park*, the California Supreme Court construed the language that a wobbler becomes a "'misdemeanor for all purposes'" in section 17, subdivision (b). (*Park, supra*, 56 Cal.4th at pp. 790-804.) The court stated: "From the decisions addressing the effect and scope of section 17(b), we discern a long-held, uniform understanding that when a wobbler is reduced to a misdemeanor in accordance with the statutory procedures, the offense *thereafter* is deemed a 'misdemeanor for all purposes,' except when the Legislature has specifically directed otherwise." (*Park*, at p. 795, italics added.) The court noted that "[t]he language of section 17 added in 1874 . . . gave rise to the . . . rule that if the court exercised its discretion by imposing a sentence other than commitment to state prison, the defendant stood convicted of a misdemeanor, but only from that point

forward; classification of the offense as a misdemeanor did not operate retroactively to the time of the crime's commission, the charge, or the adjudication of guilt." (*Park*, at p. 791, fn. 6.)

In *Park*, the defendant's wobbler had been reduced to a misdemeanor "before defendant committed the current crimes," and thus before the trial court used the prior convictions to enhance their sentences. (*Park, supra*, 56 Cal.4th at p. 787.) *Park* is distinguishable from the present case. In contrast to *Park*, here, the trial court imposed the one-year term for the section 667.5, subdivision (b) enhancement in August 2013, which was more than two years before the trial court redesignated the underlying offense to a misdemeanor in case No. F14501. Defendant's reliance on *Flores*, *Acker*, and *Culbert* is misplaced for the same reason. (*Flores, supra*, 92 Cal.App.3d at pp. 464, 470 [the defendant's 1966 conviction, which became a misdemeanor in 1975, could not serve as the basis for a prior prison term enhancement when defendant was sentenced for a 1977 crime]; *Acker, supra*, 158 Cal.App.3d at pp. 889-890, 892 [the trial court's grant of probation for a 1978 felony conviction under section 1170, subdivision (d) "erased the prison commitment" which provided the basis for a section 667.5, subdivision (b) enhancement when the defendant was sentenced for a 1981 crime]; *Culbert, supra,* 218 Cal.App.4th at pp. 188, 193 [the defendant's 1999 conviction, which was reduced to a misdemeanor pursuant to section 17, subdivision (b)(3), did not qualify as a prior serious felony as a basis for a section 667, subdivision (a) enhancement when the defendant was sentenced for a 2010 crime]).

Defendant acknowledges that several Court of Appeal decisions have held that section 1170.18 does not allow for the dismissal of a prior prison term enhancement when the sentence was final before the redesignation of the felony. (*Valenzuela, supra*, 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201; *People v. Carrea* (2016) 244

Cal.App.4th 966, review granted April 27, 2016, S233011; *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539.) However, he claims these cases are distinguishable. Defendant contends that he was seeking prospective, not retroactive, application of section 1170.18, because the underlying conviction for the section 667.5 enhancement had been reduced to a misdemeanor before he was resentenced in case No. F22948 in January 2016.

Even assuming that defendant was seeking prospective application of section 1170.18, the trial court did not err when it refused to strike the prior prison term enhancement. *People v. Acosta* (2016) 247 Cal.App.4th 1072 (*Acosta*), review granted August 17, 2016, S235773, is instructive. In *Acosta*, the appellate court considered whether the trial court had properly imposed prior prison term enhancements even though the underlying felony convictions had been reduced to misdemeanors pursuant to Proposition 47. (*Acosta*, at p. 1078.) The *Acosta* court interpreted the phrase "for all purposes" in section 1170.18, subdivision (k) as applying to "the simple status of conviction of a felony," which is "the plain, unambiguous, and only reading of the statute." (*Acosta*, at p. 1078.) The court reasoned: "There is no mention of the separate and distinct enhancement of prior prison term service in Proposition 47. Section 1170.18, subdivision (k) cannot be construed to apply to the actual service of a prison term. Crediting appellant's contention would be a windfall beyond the imagination of the drafters of Proposition 47. We certainly cannot impute such knowledge to the electorate since there is no mention of it in Proposition 47. Indelible erasure of such for all time for subsequent felonies would be an extreme and unreasonable gift to a recidivist. [¶] The person who has served a term in prison has had the opportunity for a 'crime-free cleansing period of rehabilitation . . . [and] the opportunity to reflect upon the error of his or her ways.' [Citations.] This status is something different, and in addition to a simple felony conviction. . . . There is an obvious distinction between a convicted felon who has

not been sentenced to prison and a person who has done time in the state penitentiary. . . . [¶] . . . [N]othing in Proposition 47 expressly mentions that an offender is relieved of the penal consequences of having served a term in prison." (*Acosta*, at pp. 1078-1079.) We agree with the reasoning in *Acosta*.[7]

III. Disposition

The order is affirmed.

[7] Defendant also contends that he may not be denied relief on the ground that his conviction was based on a plea agreement. Here, as previously discussed, defendant was not eligible for relief under Proposition 47.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.